Nos. 460 - 461

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

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v.

SOUTHERN ASSOCIATION OF BELL TELEPHONE EMPLOYEES

WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals which is here being reviewed is reported in 129 F. (2d) 410. The opinion and order of the National Labor Relations Board is reported in 35 N. L. R. B. 621.

JURISDICTION

The Board invoked the jurisdiction of this Court under Section 240 of the Judicial Code, as amended (U. S. C., Title 28, Section 347), and under Section 10 (e) and (f) of the National Labor Relations Act.

STATEMENT

The Statement of the case and the review of the evidence contained in the brief for the Board omit essential facts and are otherwise inadequate. A further statement is necessary before the issues can be properly discussed.

This respondent is one of twenty-four associated companies which, with the American Telephone and Telegraph Company, comprise what is known as the Bell System and furnish a nation-wide local and long distance telephone service. This Company furnishes such service in nine southeastern states. As of March 1, 1941, it served by direct connection approximately 1,375,000 telephone subscribers, with a total employee personnel of about 23,000. Its service is essential in the highest degree to the war activities of the nation. (R. 265-268)

The respondent Southern Association of Bell Telephone Employees (hereinafter called the Association) is a labor organization, comprising in its membership a large majority of the employees of the Company. (R. 257, 266, 221) It is one of a group of large independent unions of employees of the Bell System companies. It is organized into locals and divisions throughout the Company's territory and a central organization, and functions through local chairmen, various committees and officers, and a governing board of thirty-five members, known as the General Assembly, which meets annually. (Board's Exhibits 15, 30, 31, 32 and 33) A Gen-

eral Executive Board was created by the new constitution of 1935 (effective February 1, 1936) to function between the meetings of the General Assembly. In 1936 the Association had 354 locals (R. 315); membership has always been voluntary, and a number of eligible employees at all times have been non-members. (R. 134-135) For years before the enactment of the National Labor Relations Act the Association and the Company had engaged in collective bargaining and the adjustment of grievances, and at that time there was in effect a written contract between them governing the procedure in such matters and their mutual relations. (Board's Exhibit 4.) It has been customary to renegotiate such contracts annually. (Board's Exhibit 4, R. 284-286; Board's Exhibits 30, 34, 35 and 36)

Before the adoption of the Act the Company bore such expense as was incurred in the operation of the Association. In other respects, however, the organization was independent of the management and entirely self-governing. Management had no representation on it, no right to appoint officers, local chairmen or committee or board members, and no veto power over any of its actions. (R. 103; see also Board's Exhibit 4) There is no suggestion in the record that the Company ever tried to control or influence the actions of the Association in any way.

Moreover, despite a subtle suggestion in the Board's brief about conditions of some twenty-four years ago, there is no evidence whatever that the

Association was ever used as a means of opposing other unions. On the contrary, the Company has no record of hostility toward organized labor nor toward any national labor organization. The total absence of proof of this character is material, because in a number of reported cases the effect of various incidents and matters has been determined in the light of whether the particular company involved had a record of hostility to organized labor, or the contrary.* Matters which in themselves would be treated as unimportant have in some cases been treated as acquiring importance because connected with an attitude of hostility toward union labor on the part of the company, known to the employees.

Likewise, this Company has never discriminated against any employee or organization of employees on account of any labor activities, or on account of an employee joining or not joining any labor organization (R. 216), or used any influence with or offered any inducement to its employees in any such matters.† This fact is not only shown by undisputed evidence, it is also admitted by the Board's counsel. During the trial of the case, when the Company's counsel was proving the substance of the foregoing

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* "The employer's attitude towards unions is relevant." *N.L.R.B. v. Link-Belt Co.*, 311 U. S. 584, 588; "For years prior to the events in this case the Virginia Electric and Power Company * * * was hostile to labor organizations." *N.L.R.B. v. Virginia Electric & Power Co.*, 314 U. S. 469, 470-471.

† The trifling incidents at Shreveport in 1940 do not amount to an exception to this statement. They are discussed hereafter.

statement in some detail, the attorney for the Board, Mr. Woods, interrupted with the following objection:

> "Mr. Examiner, I object to all of these things. The complaint here is clear, and charges one thing, that is, domination of the Association, and I have not charged, and do not now charge, and will not charge that the Company has discriminated against any employe for union membership, or that it has violated any section of the Act other than 8 (1) and 8 (2)." (R. 217)

When the National Labor Relations Act became effective on July 5, 1935, both the Company and the employees took the steps they considered proper to bring their existing relationship into conformity with the new legislation. On the part of the Company this involved giving immediate notice to the employees of their rights under the Act and the purpose of the management to comply with it fully; and the issuance of operating instructions for the guidance of those who had to deal with the application of the Act. On the part of the employees it involved a complete reorganization of the Association to place it on a self-sustaining financial basis and the negotiation of a new contract to supersede the one then in force. Everything was done in the most direct and simple manner, with no tricks or concealment. The record shows simply a straight-forward effort all around to obey the law as then understood.

On July 16, 1935 (*eleven days after the effective date of the Act*), Mr. J. E. Warren, then the Company's Vice President in charge of operations, later

its President, called a meeting in Atlanta of all the principal officials of the Company, both general and of the nine states in which the Company operates, for the purpose of announcing and giving directions on the Company's policy with respect to the Act. Also present at this conference were the chief staff assistants of the general departmental heads, as well as the President and General Secretary of the employee organization. (R. 104, 229)

Mr. Warren at this meeting read extensively from the National Labor Relations Act, laying especial emphasis on Sections 7 and 8, and explained to those in attendance the rights of employees under these provisions, as well as the duties and obligations of management thereunder. He further stated in substance that the employees had a right to do whatever they wished about labor organizations; that the employees had a right to select their own representatives and their own unions or organizations, and that management must exercise an absolute "hands-off" policy and in nowise advise with the employees on such matters, and under no condition indicate what form of organization management preferred, if any; and that it was and would be the policy of the Company to observe the Act to the letter and spirit. (R. 104, 230, 214-215, 222)

When he testified before the Board, Mr. Warren produced the copy of the Act from which he had read at the meeting. It contained a pencil jotting in his handwriting, made at the time, showing the points

he wanted to stress. This reads, "Cannot talk, cannot advise, cannot tell employees what form of organization we prefer." (R. 230)

At this meeting Mr. Warren also directed the officers of the Company and the state officials to call in their subordinates with supervisory power, and fully instruct them as to the rights of employees and the obligation of the Company under the Act, and the Company's policy of strict observance of and compliance with both the letter and the spirit of the Act. He instructed those present promptly to communicate the Company's policy to all such supervisory employees *and to inform the entire employee body* of the Company's policy as announced in the meeting, and of their rights under the Act, and the Company's policy strictly to recognize and respect all of their rights, as well as the Company's complete neutrality with regard to all labor organizations or activities. (R. 231, 215)

These directions of Mr. Warren were promptly carried out, and his statements, as hereinbefore recited, as to the rights of employees under the Act and of the duty of management thereunder, and of the policy to obey it strictly and to maintain neutrality in all labor organizational matters, were promptly transmitted to all supervisory personnel *and to the entire employee body of the Company.*

The following stipulation is a part of the record:

"It is stipulated that in July, 1935, the respondent had Division Managers and Superin-

tendents in various departments of the Divisions, and District Managers and Superintendents in various departments of the Districts, to the aggregate number of in excess of 120.

It is stipulated that if these men were called as witnesses they would testify that promptly after Mr. Warren's meeting of July 16, 1935, the substance of Mr. Warren's statement as to the Wagner Act, and as to the policy of the Company with respect to that Act as shown in Mr. Warren's testimony in this record, was by such Division and District Officers communicated to their subordinates *and to the general body of employees of the Company.* It is further stipulated that they would also testify that so far as each one's individual information went *the policy so stated had not been departed from.* It is stipulated that the record in this case may be considered as if such persons had so testified herein and with the same effect as if they had so testified." (Italics added.) (R. 245-246).

At about the same time the Company issued a bulletin, dated July 20, 1935 (R. 284), prescribing what practices should be followed by the operating people in business arrangements affecting the Association. This was in the nature of an operating instruction, not a statement of policy; it did not purport to cover the same ground as Mr. Warren's statement. The Board's brief speaks of it repeatedly as something the Company "issued to the employees" (pp. 3, 16, 30, 35), but evidence to this effect is lacking. Mr. Warren testified that it was prepared "for the guidance of the staff and its officers, supervisory em-

ployees." (R. 235) The purpose of the bulletin was to give direction for the withdrawal of Company support of the Association as required by the Act. Incidentally it stated certain minor privileges which it was then believed were permissible, and which were withdrawn early in 1937. The Board's misconstruction of this bulletin is discussed later.

The reorganization of the Association which was initiated in July and August, 1935, was the spontaneous act of the members. Suggestions for dealing with the problem arising from the new legislation were first requested from all the locals. (R. 271) A small committee chosen by ballot from the membership of the General Assembly then did the spade work of drafting a new constitution. (R. 128, 143, 180, 255) Following this the General Assembly at a four-day session studied, amended and finally approved the constitution (R. 280-282, 255-256), which was then submitted to the locals for ratification and became effective on February 1, 1936. (R. 107, 295) Mr. Dumas, Assistant to the Vice President of the Company, stated to the General Assembly that the Company would insist on meeting the provisions of the law to the letter, because it heartily approved of the objectives and policies the law set forth. (R. 214, 279) The statement in the Board's brief that "officials of the Association * * * revised the constitution" (p. 19) does not convey a correct impression of what occurred; and the unsupported finding of the Board (R. 115) repeated in its brief (p. 3), attribut-

ing the whole thing to Askew, Weil and Mrs. Wilkes, is dealt with in a later section of this brief.

Inasmuch as a new contract between the Association and the Company had also to be drafted and was to be submitted to the meeting of the General Assembly, this was drawn up by the small committee at the same time as the new constitution, and the terms were conditionally agreed upon with the management. (R. 144) Although the document was actually signed on September 3, the undisputed evidence is that it was not to become effective until February 1, 1936, and then only in the event the new constitution was ratified by the locals. (R. 148-149, 181, 213, 218, 236). No other union claimed to represent any of the employees during this whole period. Before the new contract became effective, a membership canvass had been made by the Association, and signed applications had been secured for membership in the reorganized Association from 12,187 employees, over 80% of those eligible to join. (Board's Exhibit 37, R. 107, 211)

After the reorganization of the Association, there followed a period of about five years which is of the greatest importance in this case. During these five years the Association was self-supporting and self-governing. There is no evidence of the slightest attempt on the part of the Company to dominate, control or influence it. There is nothing to suggest that the Association's policies or activities were affected in any way by the circumstance that in earlier years

the Company had contributed to its support. On the contrary, the record shows that throughout this period it carried on active and effective collective bargaining with the management, which resulted in substantial gains in wages and conditions of employment, and at the same time its membership steadily increased. (Board's Exhibits 16, p. 11; 19, p. 11; 27, p. 10; 28, p. 11; 29, p. 11; R. 257-258, 315-316)

The Company meanwhile followed exactly the policy Mr. Warren had announced. The only further development came in 1937, when it was thought necessary to adopt stricter rules about the business relations with Association officers. Two successive bulletins were issued forbidding certain privileges that had previously been allowed. (R. 309-311) In the bulletin issued in April, which was distributed and circulated to all employees (R. 170-171), the following among other principles, were stated "to be observed by this Company in dealing with the Southern Association of Bell Telephone employees":

> "The Company cannot engage in any activity designed to induce or prevent its employees from joining this or any other labor organization."
>
> "The provisions of this Act make it illegal for an employer to dominate or interfere with the formation or administration of any labor organization, and the Management of this Company should conscientiously observe these provisions." (R. 311)

Five and one-half years after the passage of the

Act, the right of the Association to represent the employees of the Company was questioned for the first time, when the I. B. E. W., the complaining union, began its unsuccessful attempt to organize the employees of the Shreveport, Louisiana, exchange. (R. 257) No claim in behalf of any competing union has been made at any other of more than 900 exchanges which the Company operates. Statements critical of the complaining union at Shreveport, which are attributed to the management, are found by the Board to have reached four employees. (R. 117) We discuss this hereafter among the other unsupportable subsidiary findings.

The significant thing at Shreveport, however, is not the one or two unauthorized remarks that may have been made, but the authoritative action which the management of the Company immediately took to deal with the situation. The General Traffic Manager of the Company went to Shreveport and reminded the local manager of the Company's policy of neutrality in labor organization matters. (R. 243-244) The local manager called in all the supervisor operators and instructed them that the Company was absolutely neutral in the organizational contest. (R. 208-209) That policy was thereafter strictly followed.

Finally, after the complaining union had filed its charge with the Board, the referendum was conducted by the Association early in 1941, in which an overwhelming majority of the employees re-affirmed their desire to be represented by the Association as

their agency for collective bargaining. (R. 47-49, 322-324) Before the vote was taken, collective bargaining relations between the Association and the Company had been severed (R. 316-319), and the Company posted on every bulletin board a notice to employees reading as follows:

"SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

NOTICE

TO ALL EMPLOYEES:

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY DIRECTS YOUR ATTENTION TO THE FOLLOWING SECTIONS OF THE NATIONAL LABOR RELATIONS ACT (WAGNER BILL):

[Here followed in full Section 7 and Section 8 of the Act.]

THE COMPANY RECOGNIZES ITS EMPLOYEES' RIGHT TO JOIN, FORM OR AFFILIATE WITH ANY LABOR ORGANIZATION OF THEIR OWN CHOICE AND FREELY TO EXERCISE ALL RIGHTS SECURED TO THEM BY THIS ACT.

THE COMPANY GUARANTEES ITS STRICT COMPLIANCE WITH ALL THE PROVISIONS OF THIS ACT AND THAT NO EMPLOYEE WILL BE DISCRIMINATED AGAINST OR SUFFER ANY OTHER PENALTY BECAUSE OF HIS OR HER EXERCISE OF ANY RIGHT SECURED BY THIS ACT.

THE COMPANY IS NOT INTERESTED IN WHETHER ITS EMPLOYEES JOIN OR DO NOT JOIN ANY LABOR ORGANIZATION.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

J. E. WARREN,
President."

(R. 26-27, 233-234, 318-319)

The whole record can be summed up in the words of the Circuit Court of Appeals:

> "No case has been cited to us, we have found none, where the record is so completely lacking in any evidence of anti-union activities, anti-union bias on the part of the employer; none where it shows such scrupulous recognition, such earnest efforts to ascertain and abide by the obligations imposed by the act, and such complete avoidance of any act or word from which domination or interference by the employer could be inferred; none in which there was such complete absence of even an atmosphere of seated purpose or preference for one labor organization over the other, or for any; none in which the evidence more positively and beyond question showed that the employees had freely and without any interference, coercion, restraint or even persuasion, on the part of the employer, selected their bargaining representative. There is no claim that the company has ever discriminated against any employee or organization of employees on account of any labor activities or on account of an employee joining or not joining any labor organization. There is no claim that it or any of its supervisory personnel has in any wise intimidated, coerced or used force or threats thereof, or offered any inducements to any of its employees for or on account of any of its employees' labor organizational activities, or on account of any of them joining or not joining any labor organization." (R. 340-341)

ANALYSIS OF QUESTIONS INVOLVED

The ultimate question which must be decided before the validity of the order of disestablishment in this case can be finally determined is whether the employees' organization is *now* employer-dominated. This ultimate question here involves some subordinate problems. The principal one is the effect to be given to Company support before the statute was enacted and more than five years before the complaint was filed. As to this we take issue with the position of the Board as expressed in the brief of its counsel, that nothing could purge the effect of such support before the Act except complete and technical disestablishment. We insist that, as the statute contains no such provision, it does not authorize the Board to set up a mechanical formula of this kind to be applied in all cases, regardless of the particular facts. Company influence in the long past cannot justify passing a death sentence upon a labor organization which has become wholly free from such influence and represents at the time of the hearing the free and untrammeled choice of the employee body. To do so would deny to such employees the rights guaranteed to all employees by the National Labor Relations Act (see *Section 7 of the Act*).

No one doubts that under some circumstances the Board may rely on past acts of company domination or support as creating a presumption of present company influence sufficient to justify disestablishment. The decisions of this Court on which the Board relies

establish this. None of these cases on the facts are at all similar, however to the present case. In each of them there were grounds, which are absent here, for holding that the company influence was continuing substantially to the time of the hearing. If any interval of time elapsed after withdrawal of company support, it was of short duration. In the present case the only company support shown by substantial evidence ended with the passage of the Act. For at least five years the Association had been operating freely, independently, and with no substantial evidence of company influence or domination. Such a situation has not heretofore been presented to this Court. Furthermore, the present case differs from the cases on which the Board relies in the complete and uncontradicted showing that this particular Company has no record of hostility to organized labor or any particular type of organization; and in the uncontradicted showing that the Company has uniformly, consistently and without evasion endeavored to obey the Act in all respects. Moreover, no competing union has here been opposed or discriminated against; the Company has displayed no favoritism.

How simple an issue this case presents and how strikingly it differs from the decisions of this Court cited to sustain the Board's order, will be apparent when the case is stripped of certain subsidiary findings of the Board which are without substantial support in the evidence. Without these subsidiary findings the order of disestablishment can rest upon

nothing but the Board's theory that the effect of the support formerly extended by the Company to the Association must be taken to have continued for more than five years by virtue of a mere presumption in the face of strong evidence to the contrary.

We shall endeavor to show later that the findings to which we refer cannot be sustained. At the moment, let us merely set them out and characterize them as we believe the evidence requires:

1. An erroneous construction of the Company's bulletin of July 20, 1935 (followed by two bulletins in 1937), by which the Board asserts that the bulletin nullified in the minds of the employees Mr. Warren's statement informing them of their rights under the Act and of the Company's complete impartiality in the matter of organizing for collective bargaining. Actually the bulletin cannot be read as contradictory of Mr. Warren's statement, but was merely an honest attempt to apply the Act as then understood to the existing situation.

2. A finding of continued support and domination in certain minor privileges allowed to the Association (no question of discrimination between unions arising) during a period ending more than three years before the complaint herein. These privileges were promptly discontinued in 1937 when some question arose as to the propriety of permitting them.

3. A finding, which is not supported by evidence, that the Company is "responsible" for the activities of Mrs. Wilkes, Askew and Weil, particularly in "accomplishing" the reorganiza-

tion of the Association; and an unwarranted assumption, which the Association's records negative, that to the employees these persons represented the management.

4. A finding of interference with the rights of the employees in two trivial incidents at Shreveport late in 1940,—an unauthorized conversation of a local traffic manager with a supervisor operator which was promptly repudiated and corrected by the management, and a single ambiguous sentence attributed to an employment supervisor which is interpreted as hostile to the complaining union. If such insignificant occurrences can be considered to be in technical violation of the Act, they cannot constitute substantial evidence to support an order of disestablishment.

These are all the subsidiary findings of the Board we have discovered upon which it sustained the charge of continued domination and support, other than the simple record of the assistance which the Company gave the Association under its old Constitution before the passage of the Act, and the Company's continuing to recognize and deal with the Association during and after its reorganization without a technical "disestablishment."

With the above unsupportable findings eliminated, —as they must be eliminated,—the remaining question is simply whether the Board could order disestablishment in 1941 because of company support that ended in 1935. The Board insists upon following this course upon the theory, as we understand its

position, that the effect of the past company support of the Association could never be dissipated unless the Company in so many words withdrew recognition. To draw a conclusion of present domination from the evidence in this case by the application of such a dogmatic rule, we believe to be wholly arbitrary and beyond the power of the Board. A contrary conclusion is compelled by affirmative evidence that the effect of past company influence had been long since dissipated.

This affirmative evidence centers around the several declarations which the Company made to the entire body of employees over a period of years of its policy of non-interference in the self-organizing activities of the employees and their freedom of action to join or refrain from joining labor organizations; the repeated expression by the employees of their desire to be represented by the Association, particularly in the 1941 balloting after collective bargaining with that organization had been suspended; and the demonstrated independence of the employees in effecting a reorganization of the Association as an independent agency in 1935 and in collective bargaining through the Association since that time. With respect to this evidence, also, the Board has made certain unsupported findings and has in part refused to recognize the effect to which, in the situation as a whole, it is entitled. The basic error of the Board, however, lies in its applying a preconceived mechanical test to the problem of disestablishment instead of examining and deciding the question with a view

only to protecting the employees in their right to be represented by an agency of their own choosing that is free of company domination at this time.

PAST COMPANY INFLUENCE WHICH IS NO LONGER EFFECTIVE DOES NOT AUTHORIZE ORDER OF DISESTABLISHMENT

(a) Present Domination or Influence by Employer Necessary to Sustain Order of Disestablishment

The purpose of the National Labor Relations Act is remedial, not punitive:

> "The remedial purposes of the Act are quite clear. It is aimed, as the Act says (§1, 29 USCA §151) at encouraging the practice and procedure of collective bargaining and at protecting the exercise by workers of full freedom of association, of self organization and of negotiating the terms and conditions of their employment or other mutual aid or protection through their freely chosen representatives."
>
> • • • •
>
> "• • • We have said that 'the power to command affirmative action is remedial not punitive' [citing cases]. We adhere to that construction." (*Republic Steel Corporation v. National Labor Relations Board*, 311 U. S. 7, 10, 12.)

See also *National Labor Relations Board v. Newport News, etc. Company*, 308 U. S. 241, 250; *National Labor Relations Board v. Fansteel Metallurgical Corporation*, 306 U. S. 240, 257. More spe-

cifically, we are concerned with the right conferred upon the employees by Section 7 of the Act, namely:

> "Employees shall have the right * * * to bargain collectively through representatives of their own choosing."

In order to protect this right, the Act forbids employers to dominate, interfere with or contribute support to a labor organization. (*Section* 8(2)) If an employer engages in these forbidden acts, the result may be to interfere with the right of the employees to select bargaining representatives of their own choosing; and if such a state of affairs has been created and exists at a given time, the Board may at that time refuse to permit the dominated or supported labor organization to represent the employees. Thus acts of domination, interference or support, although broadly prohibited as unfair labor practices by Section 8(2), will justify an order by the Board "disestablishing" a labor organization only when the effect of the acts at the time in question is to interfere with or obstruct the basic right of the employees to select freely their representatives for collective bargaining. Otherwise, such an order, precluding the employees from selecting a particular organization as their representative, would not effectuate the policy of the Act, but would thwart it. The Board may not make such an order as a means of punishing the employer, for its powers in this respect must be directed toward correcting some existing evil in the situation with which it is confronted. This is the principle, we believe, which this

Court was stating in the case of *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261:

> "We may assume that there are situations in which the Board would not be warranted in concluding that there was any occasion for withdrawal of employer recognition of an existing union before an election by employees under §9(c), even though it had ordered the employer to cease unfair labor practices." (p. 270)

A clear distinction exists, therefore, between past unfair labor practices constituting *acts of domination* on the part of an employer and an existing *state of domination* in the current relations between the employer and the union. Unless this distinction is noticed, the use of the word "domination" may cause confusion. An order to withdraw recognition from a union cannot be supported unless the union is presently dominated by the employer. An inference of present domination may be drawn, of course, in a proper case from past acts of domination; but in a different case the evidence may show that the effect of the past acts has been dissipated and no inference of present domination may be tenable. The Board is to find the facts and draw the appropriate inferences, but its findings must be supported by substantial evidence and its inferences must be reasonable.

Thus, in reviewing the facts in the *Heinz* case, which we discuss hereafter (*H. J. Heinz Company v. National Labor Relations Board*, 311 U. S. 514, 522), the Court said:

"Disestablishment is a remedial measure under §10(c) 29 USCA §160(c) to be employed by the Board in its discretion to remove the obstacle to the employees' right of self-organization, resulting from the continued or renewed recognition of a union whose organization has been influenced by unfair labor practices. Whether this recognition is such an obstacle is an inference of fact to be drawn by the Board from all the circumstances attending those practices.

• • •

From this and other circumstances disclosed by the evidence, the Board inferred, as it might, that *the influence of the participation of petitioner's employees in the organization of the Association had not been removed* and that there was danger that petitioner would seek to take advantage of such *continuing influence* to renew its recognition of the Association and control its action." (Italics added.)

The reverse of the situation in the *Heinz* case exists here, and the opposite result is required—namely, the influence of the employer's support has been removed and there is no continuing influence that could be taken advantage of.

In connection with this line of thought, we believe the Board's counsel here confuse the question actually at issue in this case. Opposing counsel evidently believe that the Circuit Court of Appeals held that the unlawful conduct of the employer must be continuing at the time of the complaint and hearing in

order for the Board to be authorized to order disestablishment.* In this view opposing counsel have misapprehended the ruling actually made by the Court, and indeed the question actually involved. It is not a question of whether an employer has continued unlawful acts to the time of hearing. The question is, rather, whether, taking into account the past acts of the employer, the employee organization at the time of hearing is *then* free from company influence and domination. A failure to observe this distinction is probably the cause of opposing counsel's misunderstanding of the decision of the Circuit Court of Appeals in the respect above pointed out.

It is settled that the courts can review the question of whether the affirmative relief ordered by the Board is appropriate to accomplish the purposes of the Act. With reference to the authority of the Board to order affirmative action, this Court has recently said, in *Southern Steamship Company v. National Labor Relations Board*, 316 U. S. 31, 46, "* * * this discretion has its limits, and we have already begun to define them." See in this connection *National Labor Relations Board v. Fansteel Metallurgical Corporation*, 306 U. S. 240, 257; *Republic Steel Corporation v. National Labor Relations Board*, 311 U. S. 7, 12; *National Labor Relations Board v. Express Publishing Company*, 312 U. S. 426.

It would seem obvious that to disestablish an employee organization which at the time of the order

* See Board's brief, pp. 52-53.

of disestablishment was entirely free from company influence and represented the free choice of the employees, would not accomplish the purpose of the Act. Such an order would directly frustrate one purpose of the Act, namely, the protection of the employees' right to choose whatever labor organization they wish. If based on past company influence it would be a mere punitive order which is beyond the power of the Board to make. Where, as pointed out by this Court in the cases just cited, an order of the Board is not appropriate to accomplish the purposes of the Act, it is the duty of the court to set the order aside.

The Act authorizes the Board to institute proceedings whenever it is charged that any person "has engaged in or is engaging in" an unfair labor practice; and if the charge is sustained, to order the respondent to cease and desist and "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies" of the Act. (*Section* 10(*b*) *and* (*c*)) This agrees with our analysis of the problem. True, the Board may take action because of past unfair labor practices which an employer "has engaged in," but as we have said the action must be appropriate to effectuate the policies of the Act. For example, an employer may not be ordered to cease all types of unfair labor practices merely because he has committed an unfair practice of a particular kind. *National Labor Relations Board v. Express Publish-*

ing Company, 312 U. S. 426.* Clearly, then, the Board cannot make the occurrence of past unfair labor practices the occasion for going even beyond the issuance of a "cease and desist" order, by ordering withdrawal of recognition, unless the present effect of the past practices justifies that action regardless of those practices as violations of the Act in themselves.

We speak in this connection of unfair labor practices because that is what the section of the Act under discussion deals with. Obviously, the conclusion applies with even greater force in a case such as ours, in which the employer's acts in supporting the union occurred before the enactment of the statute, at a time when they were not unlawful and hence not unfair labor practices.

(b) Decisions of This Court Do Not Sustain the Position of the Board

(1) Distinguishing Facts of the Cases

We have said that the decisions of this Court on which the Board relies are very different on their facts from this case, particularly in that active company influence was relatively close in point of time to the proceeding before the Board. In the following paragraphs we give certain facts relating to a num-

* "To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past. That justification is lacking here." (312 U. S. 437.)

ber of the cases decided by this Court which are most commonly cited as controlling upon the proposition that recognition should be withdrawn from a union that has been dominated or favored by the employer.

National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261. In this case the employer had not only interfered in the organization of an employee association but had afterwards continued interference, restraint, and coercion of employees and financial support of the employee organization. The members of the organization paid no dues, could not present grievances without the consent of the employer, and the employer had an equal vote upon changes in the by-laws. The company openly opposed a rival union.

National Labor Relations Board v. Pacific Greyhound Lines, Inc., 303 U. S. 272. The employer in this case sponsored, interfered with and supported an employees' organization. "During a period of three years it had been successfully used by respondent as an instrument for preventing three successive attempts for the organization by respondent's employees of a union free from company domination." (pp. 274-275)

National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Company, 308 U. S. 241. In this case a joint organization of employees and management, governed by a general joint committee on which management was directly represented, and obviously illegal under the Act, was continued until

the Act was held constitutional in 1937, when a revision was made. This revision, however, "left the company still in the position of dominating and interfering in the formulation and administration of the plan." (p. 247) Even after this revision, action by the governing committee to be effective required the agreement of the company, and amendments to the plan could "become effective only if the company fails to signify its disapproval within fifteen days of adoption." (p. 249) An attempt was made before the Circuit Court of Appeals to show that while the case was in that court this latter provision had been eliminated, but even with this amendment the case was one in which company control of the situation existed up to and beyond the actual hearing before the Board. Under this set of facts this Court sustained the Board in ordering disestablishment, saying, "On the record as made we cannot say this was error." (p. 250)

National Labor Relations Board v. Falk Corporation, 308 U. S. 453. The decision discloses that the management in this case had a long record of hostility to organized labor and that the employee organization there involved was instituted in 1937, "'as a convenient weapon to prevent the exercise of its employees' rights to self-organization and collective bargaining.'" (p. 461) The Court was, therefore, dealing with a scheme where a purportedly independent labor organization was in reality a mere dummy, a mere instrument used by management to prevent a true organization of its employees from

arising. Under these circumstances the Court refused to order the Board to place this organization on the ballot upon the mere theoretical condition that it should no longer be dominated by the employer. Since the use of the employee organization as a mere agency of management had continued to the time of the hearing, the Board concluded that no *sudden change* in the situation could instantaneously free the minds of the employees from the effects of this close and current domination.

H. J. Heinz Company v. National Labor Relations Board, 311 U. S. 514. This case involved a contest between an independent union and one of the national labor organizations. Supervisory employees of management had aggressively and continuously interfered in this contest and had supported the independent union and participated in its formation. While management later went through the form of instructing such supervisory employees not to interfere, it "took no step, so far as appears, to notify the employees that those activities were unauthorized, or to correct the impression of the employees that support of the union was not favored by petitioner and would result in reprisals." (p. 521) A close study of the case indicates that this last fact was really the controlling feature in the view of this Court.

International Association of Machinists etc. v. National Labor Relations Board, 311 U. S. 72. This was a case of a contest between two rival unions.

Instead of declaring its neutrality, the employer had evinced great hostility to the complaining union and assisted the other in its organization drive. One contention of the favored union was that no unfair labor practices were committed between July 28, when it obtained a majority of tool room employees as members, and August 11, when it received a closed shop contract. The Court characterized this contention as an "irrelevant refinement." (p. 79) The Court upheld the order directed against this union and its contract with the employer as a proper exercise of the Board's authority; and in view of the background of facts said that "the Board has the power to take appropriate steps to the end that the effect of those [unfair labor] practices will be dissipated." (p. 82)

National Labor Relations Board v. Link-Belt Company, 311 U. S. 584. This case involved a contest between what the Court calls an "inside" union and what the Court calls an "outside" union. The starting point of the decision is the declaration that "an 'inside' union, as well as an 'outside' union, may be the product of the right of the employees to self-organization." (p. 587) In considering the whole factual situation the Court begins with the proposition that "the employer's attitude towards unions is relevant." (p. 588) The factual situation which the Court held sustained the Board's conclusion embraced these elements: (1) The company's long hostility towards the national labor organizations; (2) its long practice of industrial espionage, which apparently had not ended; (3) the aggressive aid which its

supervisory officers gave to the independent in opposition to the national union; (4) "the failure of the employer to wipe the slate clean and announce that the employees had a free choice"; (p 598) (5) the discriminatory discharge of employees for activity in behalf of the "outside" union.

Westinghouse Electric & Manufacturing Company v. National Labor Relations Board, 312 U. S. 660. The facts in this case are not shown in the decision of this Court, so reference is made to the facts as reported in the Circuit Court of Appeals' decision, 112 F. (2d) 657. The case turned on the fact that, while the company made a statement to some representatives of an employees' organization that the company would be neutral, nevertheless "the company did not seek to broadcast it or its equivalent in any way to the employees—about 2,500 in all." (pp. 660-661) "The employees at large had not been advised that the company was wholly indifferent whether they joined the new union." (p. 660)

The facts in the foregoing cases on which the Board relies are sufficient to distinguish them completely from the case at bar. It cannot be said with accuracy that this Court has ever gone to any such extent upon the question of disestablishment as the Board seeks to go in the present instance. The contention of the Board's counsel, that the Board's decision is sustained by any of the cases we have reviewed, is therefore untenable. In all these eight cases there was no significant period of time within

which the company influence exerted in behalf of the favored union might have been dissipated;* in none of them was there any notice to the general body of employees by which the employer might have dissipated that influence; and in a number of them there were the additional circumstances of clear discrimination in favor of a particular union or a manifest policy of hostility to unions such as the union bringing the complaint. The facts in the present case are definitely to the contrary on each of these points. In addition, it is significant that the unions which were found to be dominated in the cases discussed above were definitely smaller and mostly more local in character than the Association in the present case, which is a union comprising a membership amounting at the time of the hearing to about 17,500 workers and covering nine states. (R. 265, 257-258) As a matter of plain common sense, an organization of such size and stability is not easily dominated. If anybody was coercing or influencing these 17,500 people during these five years, there would be some more cogent evidence of that fact than a few words addressed to two or three operators at Shreveport.

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* In most of the cases, as shown either in the opinions of this Court or the Circuit Courts of Appeal or in unchallenged findings of the Board, there were affirmative acts of interference by the employer up to or approximately up to the issuance of the complaint. Indeed, the whole chapter of employer interference, discrimination, etc., upon which the case turned was in typical instances compressed into a period of weeks, or, at most, a very few months. In no case was there the possibility of freedom from employer influence for a period as great as a year.

(2) Historical Continuity of the Association Not Controlling

It is argued, however, that the controlling circumstance here is one that we have not mentioned in the foregoing analysis of the cases. The Board contends that the Association must be disestablished because of (1) the historical continuity of the present organization with the Association as it existed prior to the Act, and (2) because the Company did not specifically withdraw recognition as a means of breaking the old relationship. Support for this position is claimed from language such as that of this Court in the *Newport News* case (308 U. S. at p. 250), or of Judge Learned Hand, referring in the *Westinghouse* case to the requirement of a "line of fracture" between the old and the new labor organizations (112 F. (2d) at 659, 660). (R. 115) Taken in the context of facts in which they were written, such expressions, we believe, should not be read as prescribing a rigid rule that the effect of former employer influence can never be dissipated so long as some degree of historical continuity exists in the labor organization and in its relations with the employer. So to hold would do violence to the very principle from which the authority of the Board to require disestablishment is derived.

Contrary to the statement in the Board's brief (p. 33), we have never thought it of controlling importance to determine whether the present Association should, from the standpoint of technical law, be considered the old organization or a new employee or-

ganization. In any event it could be considered at least an outgrowth of the old organization. This we do not contest. The entirely changed form of organization and functioning led the Circuit Court of Appeals to say that regardless of its historical connection "the old Association has been completely superseded by the present one, formed under a new constitution." (R. 341)

The question in the present case is whether the historical connection, and the relation of the Company to the Association existing before the Act, are such as to justify the inference of the Board that more than five years thereafter the Company dominated the then existing employee organization. If we grant that the historical connection could justify a rebuttable inference of continued domination (though no case has ever sustained the carrying forward of such inference for any such period of time), it was here rebutted by undisputed proof.

(3) New Relationship Required, But Technical Formalities Immaterial

We come now to the other part of the argument,—the contention that continued recognition of the Association since the enactment of the statute prevented the establishment of a new and legally correct relation between the Association and the Company. The Board's ruling announces the proposition that upon the passage of the Act the Company was under the duty of refusing to recognize the Association as a labor organization of its employees. This is based on the fact that the Company had supported the As-

sociation before the Act was passed. The Board lays this down as a fundamental principle and apparently regards it as an established rule of law.

Support of the Association before the passage of the Act was not illegal. The adoption of the Act placed certain duties on the Company and gave the Board authority to enforce compliance. What those duties were is to be determined by the provisions of the Act. The employer's duty must be tested, not only with respect to the unfair labor practices specifically defined in the Act, but also with regard to the requirements that the employees shall be entitled to bargain collectively through representatives of their own choosing.

Upon its passage the Act imposed upon the Company the immediate duty of ending its financial support of the Association; this the Company did. It imposed the further duty "not to dominate or interfere with" the administration of the Association, and not to discriminate against its employees. In all of these respects the Company's record under the proof is free from legitimate criticism. When the Act became effective, we may admit that the Company was obligated to free the collective bargaining process of any carry-over of influence from its previous financial support, by a clear declaration to the employees of its neutrality, and its purpose to respect their independence. The statute, indeed, gives the Board no specific authority to act at this point, since it is empowered to take action to effectuate the policies of

the Act only upon a finding that a person has engaged in or is engaging in unfair labor practices; and, obviously, company support before the Act became effective was not an unfair labor practice. Such a duty may be implied, however, because to continue to deal with the Association without thus clearing the decks might be said to be an act of interference or domination. In the light of such a declaration by the employer, the employees had the right to decide, free of interference or coercion, whether they wished to continue to be represented by the Association.

The difference here between us and counsel for the Board is clearly marked out. See their brief page 29. They agree that support before the Act cannot be considered an unfair labor practice or the basis for affirmative relief. They say that "continuing to deal with such a labor organization * * * does violate the Act." We insist that this statement is too broad; and, while agreeing that the Company was required to take adequate steps to clear the decks, we deny that the Act authorized the Board to say that, regardless of all that had happened in the five and one-half years since the Act was passed, nothing but formal disestablishment would meet the requirements of law.

A clear statement of the duty actually resting on the management of the Company, upon the passage of the Act, with respect to an organization which it had previously supported, is found in the decision

of Judge Learned Hand in the Second Circuit, in *Western Union Telegraph Company v. National Labor Relations Board*, 113 F. (2d) 992. Both the Court rendering this decision and the writer of the opinion have evidenced sympathy with the policy and philosophy of the statute.* We quote from that opinion as follows:

> " * * * At any rate the Company at no time took any action to declare publicly to all its employees that the act had completely changed its relations with the Association; that, so far as the old constitution might be considered as not allowing any right to strike, it was at an end; that it proposed for the future not to allow preferences or any other favors to members; *that while it would continue to treat the Association as the collective bargaining agent of its employees, the Association must stand upon its own feet, and meet the competition of the great affiliated unions;* and that in that competition the Company would stand rigidly aside, accepting whatever might result with equal grace, and making no distinction in its treatment between those who electioneered for one side or the other.
>
> We think that some such absolute and public cleavage between the old and the new was a condition *upon further recognition of the Association.* So we read National Labor Relations Board v. Greyhound Lines, 303 U. S. 261, 271, 58 S. Ct. 571, 82 L. Ed. 831, 115 A.L.R. 307; National Labor Relations Board v. Newport

* It is interesting to note that the Board appears to rely on this decision as sustaining its contrary view. See the Board's opinion (R. 115).

News Shipbuilding & Dry Dock Company, 308 U. S. 241, 250, 60 S. Ct. 203, 84 L. Ed. 219; and National Labor Relations Board v. Falk Corporation, 308 U. S. 453, 461, 60 S. Ct. 307, 84 L. Ed. 396. It is true that in those cases the unaffiliated union had had employer's representatives on its governing bodies; but that was merely an incident, not a test. The theory on which the Supreme Court went, as we understand it, was that an unaffiliated union, known for long to be favored by the employer, carries over an advantage which necessarily vitiates its standing as exclusive bargaining agent. It cannot remain such *until measures are taken completely to disabuse the employees of any belief that they will win the employer's approval if they remain in it, or incur his displeasure if they leave.* National Labor Relations Board v. Fletcher Co., 1 Cir., 108 F. 2d 459, 467; National Labor Relations Board v. Brown Paper M. Co., 5 Cir., 108 F. 2d 867, 871; Heinz & Co. v. National Labor Relations Board, 6 Cir., 110 F. 2d 843, 847, 848; National Labor Relations Board v. Greenbaum-T. Co., 7 Cir., 110 F. 2d 984, 987, 988; Westinghouse Electric & Mfg. Co. v. National Labor Relations Board, 2 Cir., 112 F. 2d 657." (Italics added.) (pp. 996-997)

In the present case there is no evidence that any employees ever had the belief that they would win the favor of the Company by remaining in the Association, or the reverse. A conclusion to this effect could be only a matter of theoretical speculation. But if such a belief had ever existed, the conduct and declarations of the management, and particularly

the absence of any trace of discrimination over a period of years, would have removed it.

The sound principles which, we submit, are to be deduced from the Act and with which the decisions of this Court are in harmony may be briefly summarized. It is by these principles that the question presented by this case should be decided:

> Historical continuity with a company-supported union will not justify an order of disestablishment if there has been a time when the employer's influence and interference with or support of the organization has entirely ended and the employees have been adequately advised of their entire liberty of action, and have thereafter expressed their choice of the organization as their representative for collective bargaining.
>
> The break required need be of no particular form, such as disestablishment, formal or informal. There is no magic in these terms or in any procedure. "We are not here dealing with the 'dissolution' or 'reorganization' of complex corporate structures. We are concerned with individual rights and human relationships as defined by a sweeping statute. So long as the employee is adequately and carefully protected in the rights guaranteed by Section 7 of the Act, we are not concerned with the exact technical form of a 'disestablishment'."*

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* Dobie, J., in *E. I. du Pont de Nemours & Co. v. National Labor Relations Board*, 116 F. (2d) 388, 399; certiorari denied 313 U. S. 571.

The question here is not affected by the circumstance that the Company on September 3, 1935, signed a new contract governing the procedure for collective bargaining. It was the regular procedure to execute new contracts of this type annually. (Board's Exhibit 4, R. 284-286, Board's Exhibits 15, 30, 34, 35 and 36) The changes in the form of contract were those desired to make it conform to the withdrawal of the previous financial support of the Company. Entering into this contract shows only that the Company continued to deal with the Association to which the great majority of its employees belonged, but this has never been denied. All of which merely brings us back to the basic question here considered, namely: Was the Board correct in its position that nothing could possibly satisfy the statute except disestablishment by the Company, and that, absent disestablishment, the Board could treat the Association, five years thereafter, as Company-dominated, regardless of everything that had occurred during the period? The circumstances of the signing of this new contract, however, emphasize the fact that in dealing with this situation the Company at no time attempted any subterfuges or any subtle evasions. It was openly, sincerely, and at times possibly a little clumsily, trying to obey the new law.

(c) Any Presumption of Present Domination Arising from Past History Is Rebuttable

It is believed that the above proposition logically results from the decisions of this Court which we

have heretofore reviewed. It was not necessary for the Court to make a specific ruling to this effect, because, as heretofore pointed out, in no one of those cases was there any satisfactory evidence to rebut the presumption from company interference and domination, and indeed such interference and domination was continuing up to or near the hearing. All the Court holds in those cases is that the drawing of inferences from proof is for the Board and not the courts and that, under the circumstances there presented, the Board was justified in drawing the inference of continuing domination. That these cases do not establish a rule that such presumption could not be rebutted follows consistently from other decisions of this Court in which the Court uniformly rejects any effort to establish a rigid formula controlling matters where "the criterion is necessarily one of degree." This disapproval of "those who seek for mathematical or rigid formulas" in dealing with practical problems growing out of varying states of facts is stated by this Court in *Santa Cruz Fruit Packing Company v. National Labor Relations Board*, 303 U. S. 453, 467-468.

The most carefully considered decisions in the Circuit Courts of Appeal deal with this problem in accord with the position here taken. They construe the effect of the decisions of this Court as authorizing the Board to draw an inference of continued domination from past history, but they also rule that such presumption is rebuttable and must yield to uncontradicted proof. See here the strong decision of the

Second Circuit in *Western Union Telegraph Company v. National Labor Relations Board*, 113 F. (2d) 992, from which we have quoted above (p. 000).

In the decision of the Seventh Circuit in *A. E. Staley Manufacturing Company v. National Labor Relations Board*, 117 F. (2d) 868, referring to decisions of this Court which we have heretofore reviewed, the Court accepts the view that such decisions announced the theory that, in the absence of satisfactory evidence to the contrary, an unaffiliated union known to be company influenced will be supposed to continue as such. The Court then adds: "We do not think such a theory can prevail in the face of direct and uncontradicted evidence that petitioner's employees understood that they were free in theory and in fact to join any labor organization they desired." (p. 878)

The decision of the Fourth Circuit, in *E. I. du Pont de Nemours & Company v. National Labor Relations Board*, 116 F. (2d) 388, certiorari denied 313 U. S. 571, is also an able study of the same question and is in substance to the same effect.

We therefore approach the consideration of the facts in the case at bar on this particular point from this standpoint: The Board, exercising its power to draw reasonable inferences from the facts, may in a proper case infer continued company influence from past domination; but this inference is a rebuttable presumption. Whether it has been rebutted is to be determined upon an examination of all the facts.

The significant fact to be considered is whether, at some definite point or points, adequate steps were taken by the employer to disabuse the minds of the employees of any idea that they would win the favor of management by adhering to the organization or would incur its disfavor by joining another. When evidence such as this destroys the presumption, a finding of domination by the Board based thereon can rest only upon a mere fiction.

(d) There Is No Substantial Evidence of Present Domination, and Any Presumption from Past Company Influence Was Here Completely Rebutted by Uncontradicted Proof

The only evidence relied on by the Board to show continuing domination is dealt with in discussing certain erroneous subsidiary findings made by the Board. The discussion is not here repeated. With these erroneous subsidiary findings eliminated, there is no evidence, substantial or otherwise, of present acts of domination, or of a present state of domination. There remains nothing but the presumption which the Board undertook to draw from Company support before the passage of the Act. This presumption was completely rebutted.

(1) Principal Points of the Evidence

Whether a presumption of continued domination from the past Company support of the Association is to be considered as persisting throughout the whole period of more than five years after the passage of the Act must be determined from a consideration of

all the facts. The evidence, when given a reasonable construction, is directly contrary to any such presumption. For convenience we now tabulate the principal facts which refute any presumption of company domination.

The Declaration of the Company's Policy.

(1) Mr. Warren's (Vice President in charge of operations) thoroughgoing statement of July 16, 1935, from his text, "cannot talk, cannot advise, cannot tell employees what form of organization we prefer" (R. 230), which it is stipulated was communicated to the general body of employees of the Company. (R. 245-246)

(2) Mr. Dumas's (Assistant to the Vice President) statement to the thirty-five members of the General Assembly of the Association on August 30, 1935, that the Company would insist on meeting the provisions of the law to the letter, because it heartily approved of the objectives and policies the law set forth. (R. 214)

(3) The April, 1937, bulletin stating that the Company could not engage in any activity designed to induce or prevent its employees from joining any labor organization, and that the Company should conscientiously observe the provisions of the law. (R. 311, 170-171)

(4) The bulletin of February, 1941, quoting Sections 7 and 8 of the Act and specifically recognizing

the right of the employees to join any labor organization and guaranteeing the Company's compliance with the Act and that there would be no discrimination. (R. 26-27, 113-114)

(5) The special statement of the Company's neutrality made by the local manager to all supervisors at the Shreveport exchange in December, 1941, when the I. B. E. W. began its efforts to organize that exchange. (R. 117, 208-209, 243-244)

The Company's Compliance with
Its Announced Policy.

(1) The stipulation that to the knowledge of the 120 Company officials who attended Mr. Warren's conference of July 16, 1935, the policy of non-interference in matters of labor organization which he then announced had not been departed from. (R. 245-246)

2. The statement of record of counsel for the Board that there is no charge that the Company has discriminated. This admission came as a part of an objection by the Board's counsel when the Company was proving that it had at no time discriminated against any employee or attempted to coerce its employees or employed labor spies or done any of the typical things to which management might resort if hostile to some form of labor organization. In his objection to this line of evidence, the Board's counsel said:

"I object to all of these things. The complaint

here is clear, and charges one thing, that is, domination of the Association, * * *." (R. 217)

(3) The passage of more than five years without any charge or any evidence that the Company has interfered or meddled in the affairs of the Association or expressed any hint as to how its affairs should be conducted.

(4) The prompt withdrawal of the minor privileges innocently allowed to the Association when their propriety came into question in 1937, and the lapse of more than three years since there has been anything that could be considered even the granting of a favor. (R. 111-112, 216, 231-232, 310-311)

The Employees' Free Selection of the Association as Their Representative

(1) The new membership cards signed by 12,187 employees, more than 80% of those eligible, after notice of the Company's policy of non-interference expressed by Mr. Warren in 1935. (R. 107, 211, Board's Exhibit 37).

(2) The continuance of their membership in increasing numbers by the employees from year to year thereafter until more than 17,500 were members at the time of the hearing. (Board's Exhibits 16, p. 11; 19, p. 11; 27, p. 10; 28, p. 11; 29, p. 11; R. 258)

(3) The referendum conducted by the Association in February, 1941, after the Association had

ceased to act as bargaining agency, after the Company bulletin notice of February, 1941, had been posted in every building, and after the organizing efforts of the I. B. E. W. had begun,—resulting in an overwhelming majority for the Association. (See discussion pages 49-51, *infra*)

Other Evidence of the Independence of the Association

(1) The evidence of the freedom of the Association from any outside influence or control, as shown by its spontaneous and self-determined internal proceedings. (See discussion pages 66-74, *infra*)

(2) The active and effective collective bargaining carried on by the Association, resulting in substantial benefits secured for its members.

(2) Effective Collective Bargaining

This last point, the collective bargaining between the Association and the Company, deserves further comment:

In general, the bargaining process between the Company and the Association has been this: local, district and division representatives have been elected to deal with the Company's representatives. In addition, there have been general employee representatives for each of the four main departments of the Company, to-wit, commercial, plant, traffic and accounting, who deal with the respective departmental heads. There has also been regular bargaining conducted between the general representatives

of all the employees, through the General Executive Board on the one hand and the President and Vice President in charge of operations of the Company on the other.

Written records of all bargaining conferences have been kept, reflecting agreements reached and matters deferred as well as those not concurred in. These are signed by representatives of the employees and the representatives of the Company, and constitute written contracts between the Association and the Company. Records of the general bargaining conferences were introduced in evidence and are a part of the record. Records of the district and division bargaining conferences, on account of their bulk, by agreement were not introduced into the record. The testimony is undisputed, however, that these district and division bargaining conferences have satisfactorily dealt with and handled local matters, and especially individual grievances.

Records of the general bargaining conferences for the years 1936 through 1940 are in evidence. It appears without dispute that during these years this general bargaining alone has resulted in agreements as to wage increases and other matters the effect of which has cost the Company in excess of three million dollars annually. This bargaining also has resulted in longer vacations with pay and many improved working conditions.

(R. 222-227, 315-316; see also Respondent's Exhibits 2, a-z)

(3) The Balloting Conducted by the Association

Another matter mentioned above is also of such importance that it requires further discussion. This is the balloting which the Association conducted in 1941. When the right of the Association to act for the employees was questioned by the Board, the Association, in February, 1941, determined to hold a referendum in which the employees would be given the free opportunity again to express their choice. As a preliminary it notified the Company that until and unless a new mandate was received it would no longer act as bargaining agent. (R. 316-317) The Company accepted this notice and proceeded to post on every bulletin board and in every building a most sweeping statement of its neutrality and of the employees' rights. (R. 113-114, 317-319)

After all this was done, the referendum was held and the results certified by public accountants. Practically 80% of the employees in this referendum selected the Association as the bargaining agency. (R. 322-323, 47-49)

The Board refused to give effect to this referendum as a free choice by the employees. Its reasons are stated in its opinion. (R. 113-114, 115-116.) We now consider these reasons:

It is said, first, that the Association was not "disestablished" at the time of the referendum so as to present a definite line of fracture, because Mr. Warren in acknowledging the letter did not "withdraw recognition," but merely said that he "noted"

that the Association would no longer act as bargaining agent. It is difficult to believe that when Congress passed the National Labor Relations Act it anticipated that the right of free choice given to employees would be questioned because of a quibble about a word.

The Board then says that Mr. Warren testified that he did not regard the existing contract as cancelled. His testimony makes it perfectly clear that he recognized that the Association was no longer the bargaining agency (R. 238), and it is undisputed that there was no bargaining by the Association for the employees during this period. (R. 113-114, 232-233, 238, 316-318; Board's brief, p. 38) In its letter to the Company announcing the suspension of collective bargaining, the Association said, "In the meantime, it will be presumed that the rights and privileges of your employees secured in the past by the Association will not be disturbed." (R. 317) In the light of these facts, the statement in Mr. Warren's testimony that the contract was not cancelled evidently means that the provisions of the contract governing working practices,—"Basic Work Week and Rates," "Working Hours," "Holidays," "Vacations," and "Absences"—were considered by the management to be still binding upon the Company. (See "Exhibit I to General Agreement Dated July 30th, 1940" (R. 304-307))

The real character of the remaining reason given by the Board is best shown by setting out in parallel

columns the notice which the Company at that time, and before the referendum, posted on all its bulletin boards, and the comments made by the Board in its opinion:

NOTICE	FINDINGS BY THE BOARD
"The Company Recognizes Its Employees' Right to Join, Form or Affiliate With Any Labor Organization of Their Own Choice and Freely to Exercise All Rights Secured to Them by This Act. The Company Guarantees Its Strict Compliance With All the Provisions of This Act and That No Employee Will Be Discriminated Against or Suffer Any Other Penalty Because of His or Her Exercise of Any Right Secured by This Act. The Company Is Not Interested in Whether Its Employees Join or Do Not Join Any Labor Organization." (R. 113-114)	"Indeed the respondent made no move to withdraw recognition from the Association, or to deprive it of its firmly rooted and manifold advantages in the eyes of the employees. In his February 11 reply to the Association Warren merely 'noted' that pending the canvass, the Association would not act as bargaining agent of the respondent's employees; *he did nothing which would lead them to believe that he was removing his stamp of approval from the Association and leaving the field clear for an uninfluenced expression of an opinion by such employees.*" (Italics added.) (R. 114)

In the light of all the foregoing, any presumption of continuing employer influence growing out of

support rendered before the passage of the Act must be considered as completely rebutted. To take any other view, in effect if not in words, amounts to the establishing of a rigid formula to the effect that past company influence, though long discontinued, can never be removed, and that any employee organization which was ever influenced by management can never under any circumstances be purged and qualified under the present statute.

The opinion of the Circuit Court of Appeals correctly analyzes the attitude which the Board has taken in this case. The Board, it says, has developed "a rigid formula, and standing upon its application here, insists that only by compliance with such formula can the company taint be purged, a new start made. The statute prescribes no such formula. Neither the Board nor the courts may do so. Whether an Association chosen by the employees is or is not company dominated or supported or if it began that way, has been purged of that taint, must be determined in each case on its own facts." (R. 341-342)

None of this is inconsistent with the view that the drawing of inferences is for the Board and not the courts. The courts are, however, given authority to determine whether the Board's conclusions are based on "substantial evidence."* The grant of this

* The court's authority to review the question of substantial evidence has been stated to be the same authority it possesses to pass on the sufficiency of evidence to require the submission of a case to the verdict of a trial jury. See *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300.

authority carries with it a corresponding duty which cannot be pushed aside. Where such review discloses, as it does here, that the Board has drawn an inference contrary to the evidence or not reasonably deducible from the evidence, the court has both the power and the duty to set that conclusion aside.

THE SUBSIDIARY FINDINGS ARE ERRONEOUS. HENCE THE BOARD'S CONCLUSION OF DOMINATION CANNOT BE SUPPORTED BY THESE FINDINGS.

We here take up certain specific findings on which the Board supports its final conclusion of domination. As heretofore pointed out, when the case is stripped of these erroneous subsidiary findings, there remains nothing on which an order of disestablishment can rest except the Board's erroneous conclusion that the Company support prior to the Act can be treated as conclusive proof of continued domination. This we have pointed out to be unsound.

It is important to strip the case of these subsidiary findings in order for the Court to have before it the ultimate question heretofore discussed. The errors in these subsidiary findings are important from another standpoint. This Court has recently, in *National Labor Relations Board v. Virginia Electric & Power Company*, 314 U. S. 469, announced a ruling that a conclusion of the Board, resting on erroneous subsidiary findings, will be vacated. In one respect the present case is very much like the *Virginia Electric & Power Company* case. In that case the Board had made an erroneous construction

of certain declarations made by management to the employees. In the case at bar the Board's final conclusion rests in part on a totally erroneous construction of the meaning and effect of the Company's bulletin of July 20, 1935.

In so far as the Board's ultimate conclusion rests on these erroneous subsidiary findings, it is impossible for its present order of disestablishment to be sustained. In so far as these erroneous findings are relied upon as additional support for the Board's main thesis that the effect of former Company support could not be removed, they are ineffective for that purpose. What has heretofore been said in this brief, however, shows that it will not be necessary, upon setting aside the order of disestablishment, to remand this case to the Board for further consideration, as was done in the *Virginia Electric & Power Company* case. In that case there were other matters in the record of sufficient importance to authorize further consideration by the Board as to whether disestablishment should be ordered independently of the erroneous findings. In the case at bar, as heretofore pointed out, with the Board's erroneous subsidiary findings eliminated, there remains nothing in the case sufficient to authorize the Board to consider disestablishment.

(a) Board's Erroneous Construction of the July 20, 1935, Bulletin, and Subsequent Bulletins.

The July 20, 1935, bulletin is shown in the record at page 284. It is entitled "Wagner Act Interpreta-

tions." The Company issued another bulletin dated January, 1937, under a similar title (R. 309-310), and a third bulletin under a similar title, dated April, 1937. (R. 310-311) The Board's discussion of these bulletins is found in its opinion. (R. 105, 108-112, 115)

The view of the Board as expressed in its opinion and repeated in its brief, is that the first of these bulletins completely destroyed the effect of the notice Mr. Warren had caused to be given to all employees of the Company's neutrality and of its intention to obey the National Labor Relations Act.

The bulletin of April, 1937, contains among other things the following:

> "The Company cannot engage in any activity designed to induce or prevent its employees from joining this or any other labor organization."
>
> "The provisions of this Act make it illegal for an employer to dominate or interfere with the formation or administration of any labor organization, and the Management of this Company should conscientiously observe these provisions." (R. 311)

Notwithstanding the clear notice given to all employees immediately upon the adoption of the Act to which we have referred, and notwithstanding the above quoted statement from the bulletin of April, 1937, the Board feels justified in saying that the Company had done "nothing which would lead them [employees] to believe that he [Mr. Warren, who

caused the bulletins to be issued] was removing his stamp of approval from the Association and leaving the field clear for an uninfluenced expression of an opinion by such employees." (R. 114)

Also, the Board, brushing away everything that the Company had done, including both the verbal notice given to all employees upon the adoption of the Act and the written notice in the April, 1937, bulletin above quoted, says:

> "In February 1941, the respondent *for the first time* made an unequivocal announcement to its employees of their rights under the Act." (R. 115) (Italics added.)

From all this it is clear that the Board believes that these bulletins nullified the declarations of the Company's position and led the employees to think that those declarations were not issued in good faith.

The expressed criticism of the bulletin of July 20, 1935, is that it "announced an assumption on the part of respondent that the Association would continue to exist and function." (R. 108) The Board further says: "It is clear that the employees correctly read and understood the July 20 notice." (R. 109) While this statement is not clarified, it seems evident that the Board treats this bulletin as carrying an effective suggestion to the employees controlling their freedom of action.

The fact is that this document was merely a brief statement of what could and could not be paid for

in connection with the activities of the Association, and what use could and could not be made of Company premises and facilities. The later ones covered the same ground, but were progressively stricter in forbidding privileges to the Association. They are simple business instructions for the guidance of anybody who had to take action on those matters.

Naturally, these bulletins referred to the Association as in existence, but without any particular assumption as to whether or how long it would continue to exist or function. It is true that they gave no indication that the Company would no longer deal with the Association, but the Board could not properly attach any significance to this fact. The Company did in fact continue to deal with the Association (until the time of the balloting in 1941), and it adds nothing to observe that incidentally it issued certain instructions to regulate the details of the relationship.

Since the Association did in fact exist and did in fact contain in its membership a large majority of the Company's employees, the passage of the Act rendered it necessary for the Company to change its relations to the Association in certain respects, relations which had been legal before the passage of the Act. It was necessary to advise the Company's officers and the officers of the Association of the changes required by the Act. The bulletin of July, 1935, did this and nothing more. There is no evidence that it was distributed widely to employees at all or that it

went to anyone other than those who should receive a notice of that kind, namely, the Company's officers and the officers of the Association. (R. 235) There is not a word, nor a suggestion, in the bulletin which goes further than this.

The finding of the Board that this bulletin nullified Mr. Warren's announcement to the employees is without the slightest foundation in the bulletin itself. The error in interpreting the statement of management here presented is more glaring than the erroneous construction which the Board put on the statement of management in the *Virginia Electric & Power Company* case. In that case the management had issued a bulletin expressing its preference for the company union and this Court held such statement was not subject to the criticism of the Board. The bulletin here under criticism expresses no preference of management one way or the other.

(b) Board's Error in Finding Company Support in Certain Minor Matters.

The Board refers, in one of its headings to continuing support of the Association. While it is not wholly clear, this seems to refer to certain practices of the Company which ended early in 1937 and which were the principal subject matter of the three bulletins interpreting the National Labor Relations Act previously mentioned.

Between the effective date of the Act and the early part of 1937, the Company paid the wages of Association representatives while engaged in conferences

with the Company and while meeting among themselves just prior to such conferences for the discussion of specific matters to be submitted to the conference, and while disposing of such specific matters following the conference. (R. 200, 284, 309) Section 8 (2) of the Act specifically provides that, "An employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay." The management of the Company was advised and believed at this time that this right of the employees to conference with the employer without financial loss necessarily included the right to reasonable preparation for such conference and reasonable time to carry into effect the result of the conference. (R. 215-216, 231-232)

During this same period the Company also permitted certain wholly minor privileges to the Association. Association meetings were allowed to be held on the Company's premises without charge, but only after office hours. (R. 284, 309) The Company has always permitted employees to make a limited use of its toll lines. During this same period it permitted Association representatives to make the same use of the toll lines, but always restricted them to the same limited basis as was effective for employees generally. (R. 137-138, 284, 309)

The Company also during this time deducted Association dues from the wages of employees without charge, but only on the individual written authorization of each employee from whose wages a deduction

was to be made. (R. 241) The Company has always honored similar deductions for other purposes without charge, and employees can have deductions made for insurance premiums and the like without expense to them. (R. 241) Finally, the Company permitted the Association during this period to post some notices on its bulletin boards, and to send communications through the Company's inter-office mail facilities.

There was no discrimination by the Company in allowing any of these privileges to the Association; no other labor organization ever sought or was refused permission to do the same things. (R. 259)

The Company's practices were governed, as we have said, by the interpretations of the Act issued July 20, 1935, and represented the considered judgment of the management, arrived at with the advice of the General Counsel of the Company. (R. 216, 231) As time went on and interpretations of the Act became available in decisions of the Board, it was decided that the privileges we have mentioned were questionable. Consequently, the two bulletins issued in 1937 forbade them, and they were discontinued early in that year. The Company thereafter paid only for the time of the Association representatives spent in actual conference with management; it charged the Association a fair rate for the relatively few local meetings that were held on Company premises; it stopped the use of its toll lines (except at full tariff rates) and inter-office mail for Asso-

ciation business; it made a fair charge to the Association for the deduction of dues; and it stopped the use by the Association of its bulletin boards. (R. 111-112, 200, 260-262, 310-311) All this was done more than three years before the issuance of the complaint in this proceeding.

What had been done during the earlier period was in general accord with the prevailing view of the interpretation that would be placed upon the statute. Of this there is judicial recognition in the case of *A. E. Staley Manufacturing Company v. National Labor Relations Board*, 117 F. (2d) 868, in which the Court said:

> "We do not believe when the act was enacted that laymen, or lawyers called upon for advice, could have reasonably anticipated that the loaning of a typewriter or a mimeographing machine, or the permission granted employees to meet on company premises, and like services and favors rendered by an employer, would demonstrate employer domination and thus result in an unfair labor practice." (p. 879)

A further statement in that opinion applies accurately to this Company:

> "The good faith of petitioner and the fact that it, with the knowledge of its employees, eliminated such practices as soon as informed they were condemned by the Board, is another circumstance which contradicts the idea that any employer domination of the character described was carried over from the earlier to the latter organization." (p. 879)

The facts as above narrated do not show support of the Association by the Company. They show on the contrary a careful and progressive effort to ascertain the requirements of the Act and to meet these requirements without evasion—an effort which the Board itself admits was completely successful for more than three years before the complaint was issued.

(c) The Board's Error in Finding Company "Responsible" for Activities of Mrs. Wilkes, Askew, and Weil, Particularly in "Accomplishing" the Reorganization of the Association.

The Board finds that the Company was responsible for the activities of Mrs. Wilkes, Weil and Askew, especially in connection with the reorganization of the Association. The finding with respect to Mrs. Wilkes and Askew is set out in footnote 2 (R. 104). The ruling as to Weil is found in footnote 4 (R. 106). The Board in its finding states that while these three employees did not have "clear supervisory powers," their duties nevertheless more closely aligned them with management than with the ordinary employees of the Company. The only evidence with regard to the duties of the three employees is their own testimony. From this it appears:

Mrs. Wilkes was the secretary to the General Commercial Manager and Chief Engineer of the Company. (R. 104, 189) She was therefore one of a large number of women employed by the Company to do stenographic and secretarial work. She had supervision over no one.

Weil's position was that of Plant Practice Supervisor in the Louisiana Division. (R. 106, 177) "Plant Practices" appears to be the name applied to the written directions as to plant routine practices, which are prepared in the Company's general headquarters. The duties of Weil were to distribute these written plant practices to the plant employees in Louisiana, and occasionally, if questions arose as to their meaning, to help with their interpretation. He had no one working under him or reporting to him. He had no power to hire or fire, or to recommend hiring or discharginng of other employees. (R. 177-178)

Askew was the Georgia Cashier of the Company. (R. 104) His duty was to take the checks in payment of the expenses of the Georgia division of the Company and to distribute them to the proper parties. He had nothing to do with the preparation of the checks, or with the determination of what should be paid or in what amount. These checks were furnished him by the Accounting Department and his duty was to distribute them. There was an employee who helped him with his work, but this employee was responsible to and reported to the Assistant Treasurer of the Company. Askew himself had supervision over no one. He had no authority to hire or fire or to recommend with regard to employment or discharging. (R. 131)

The Board's finding, therefore, that these employees did not have "clear supervisory powers"

(R. 104, 106), to be accurate must be interpreted as meaning that they had no supervisory powers at all. The Board nowhere finds that management in fact directed the activities of these employees, or that they were in fact carrying out the wishes of management. There was no evidence to this effect in the record. The Board merely says, "It is reasonable to assume that to such employees they represented the management." (R. 104, 106)

We of course recognize that in determining the responsibility of management under these circumstances the ordinary rules of *respondeat superior* do not apply. A clear statement of the rule on this subject is found in the opinion of this Court in the *Link-Belt Company* case (311 U. S. 584, at page 599), where the Court says:

> "If the words or deeds of the supervisory employees, taken in their setting, were reasonably likely to have restrained the employees' choice and *if the employer may fairly be said to have been responsible for them*, they are a proper basis for the conclusion that the employer did interfere." (Italics added.)

The *International Association of Machinists, etc.* case (311 U. S. 72) states the rule in substantially the same way. Neither case goes to anything like the extent the Board went in this case.

We can imagine a situation where management might be held responsible for the activities of non-supervisory employees, even though such activities

had not been authorized or consented to by management. This could only arise, however, where (1) the other employees supposed that such non-supervisory employees were in fact reflecting the wishes of management, and (2) this erroneous supposition arose from circumstances for which "the employer may fairly be said to have been responsible," and (3) the employer did nothing to disabuse the minds of the employee body generally of the belief that the wishes of management were in fact being reflected. Unless something of this kind were shown, however, it is not possible to say that management is responsible for what its non-supervisory employees do in the exercise of their rights under the Act.

With regard to such a situation the Second Circuit has said, in *National Labor Relations Board v. Arma Corporation*, 122 F. (2d) 153:

> "There was no evidence that the officers or supervisory employees consented that key men should represent the views of the corporation, or gave the other workmen reason to suppose that the key men worked for Independent in order to please Arma. If the latter had interfered with the labor activities of the key men, except to prevent canvassing during working hours, it surely would have been guilty of an unfair labor practice and would have deprived these men of rights guaranteed under Section 7 of the National Labor Relations Act, 29 U.S.C.A. §157." (p. 156)

The activities of the three employees in this case upon which the Board lays stress are in connection

with the reorganization of the Association in the latter part of 1935 and the early part of 1936. As these events afford a good example of the divergence between the findings made by the Board and the reality of the facts shown in the record, we shall present them in some detail. They relate in part to internal affairs of the Association with which the Company had nothing to do, but since responsibility for them is attributed to the Company, we know of no way to meet this accusation except by showing what actually occurred.

Before the Act was passed the Association had raised a fund to carry it over until it could become self-supporting, against the contingency, which might or might not occur, that Company support would be forbidden. (R. 123, 132) The record contains no evidence, nor even a hint, that this move was inspired by the Company. The President of the Association, after consulting with other leaders in the organization, notified Mr. Dumas, Assistant to the Operatinng Vice President, that the Association wanted to conduct a canvass to raise funds, and in accordance with existing arrangements covering all Association activities, the employees were allowed to do this on Company time and with the use of Company facilities. (R. 124-125, 212-213)

At this time Askew was President of the Association. The Board finds him to have been "allied" with management, so regarded by the employees, and at this point "initiating the movement" for which the Company was "responsible." (R. 104) If this were

true, Askew might be expected either openly to guide the course of the Association at this critical juncture, or at least quietly to manipulate its movements in order to accomplish certain designs of the Company, "in accordance with the latter's own manifest wish." (R. 109)

The statute was enacted on July 5, 1935. On July 12 Askew wrote to the officers and members of the Association (R. 269) asking for suggestions as to how the Association should deal with the problem presented by this new legislation. Should it be reorganized? "I think careful consideration should be given to this question and each local should decide by a vote of its members what kind of an Association we should have. * * * In the event a reorganization is decided upon another question which our members must decide is the method by which this shall be accomplished." (R. 271) He suggested for their consideration two methods,—(a) the locals and divisions to meet and prepare their views for presentation to a meeting of the General Assembly, the governing body, or (b) a small committee to be chosen to study the problem and make recommendations to the Assembly. (R. 271) Thus, instead of proposing some plan desired by the management, Askew appears undecided upon what to do and how to proceed to do it. He submits both questions to the rank and file of the membership for advice. The Association had 354 locals. (R. 191, 315)

On August 1 Askew wrote to the members of the General Assembly upon the same question. (R. 272-

273) He now proposed that a small committee be constituted, to consist of the four general chairmen, the President (himself), and the General Secretary of the Association. This recommendation was not accepted. Instead, the members of the Assembly, voting by their major divisions, elected by ballot a committee of four members. (R. 128, 185)

The small committee met at Atlanta on August 26, preceding the meeting of the Assembly on August 30, and worked during the intervening days and evenings. Differences of opinion had arisen between Askew and the committee members. Because of this, the committee excluded him from its deliberations. He made persistent efforts to enter the meeting and had to be asked to leave twice. He was only allowed to present the suggestions for reorganizing the Association which he had received from the locals and divisions in response to his letters. (R. 128, 182-183)

The committee, in the light of the recommendations received from the constituents, redrafted the constitution of the Association and negotiated a proposed contract to govern future relations with the Company, both to become effective on February 1, 1936, if the constitution was adopted by the Assembly and thereafter ratified by the locals. The only contact the committee had with the management of the Company was in discussing and negotiating the proposed contract with Mr. Dumas, Assistant to the Vice President. (R. 143-144, 148-149, 181-183, 213)

The problem was now before the General Assembly, a body of thirty-five representatives chosen from members in all departments of the Company throughout the whole territory. It convened at an Atlanta hotel without a leader. Askew called the meeting to order, tendered his resignation and immediately withdrew. He did not attend the sessions of the Assembly and never held office afterwards in the Association. (R. 129, 136, 144-145, 275-276)

So much for the Board's theory of the "strategic position" of Mr. Askew "to translate to the employees the desires of the respondent." (R. 104)

Weil was not employed, like Askew, at the Company headquarters at Atlanta; he was located at New Orleans. (R. 140) Although he was Vice President of the Association, he refused to fill by default the vacancy in the office of President. He asked for a vote of confidence and withdrew from the meeting until the Assembly elected him President to succeed Askew. (He held that office thenceforth until April, 1939.) (R. 144-145, 276)

The Assembly sat continuously over the Labor Day week-end from Friday through Monday. Upon its invitation, Mr. Dumas addressed the meeting. In the course of his remarks he informed the members that the management of the Company would insist on meeting the provisions of the new law to the letter, and that it approved of the objectives and policy of the law. (R. 214, 279) Mr. Warren's fuller state-

ment of the Company's position had already gone out to the general body of employees.

Weil, reporting to the Assembly the results of the work of the small committee, said that all suggested plans and amendments to the constitution had been considered, and the committee had endeavored to formulate a plan acceptable to all. (R. 280) With copies of the new constitution in the hands of all members, it was read and considered, section by section. Amendments were offered, discussed and voted upon, the details of which do not appear in the record. Upon the final motion for adoption there were negative votes. (R. 280-281, 187, 255-256) The proposed joint agreement with the Company was also discussed. Like earlier agreements of the same sort, it contained a provision binding the Company not to discriminate against any employee because of activity in bargaining or grievance matters. (R. 278, 285-286) Finally, the Assembly adopted a resolution assessing regular dues and providing for a special committee to handle finances until the new constitution should be ratified by the membership. (R. 252-253, 282, 334-335) In the minutes of these important proceedings there is nothing to suggest that Weil or any other member dominated or influenced the others. (And see R. 178, 179, 183)

The new constitution and the resolution to assess membership dues were submitted to, and ratified by, the locals. Some locals voted in the negative. (R. 291, 315) The constitution was sent out in printed form,

together with the new joint agreement with the Company, for distribution to the members, and there was also sent a careful and detailed discussion of the many new provisions and the reasons therefor. (R. 295-300)

Weil and Mrs. Wilkes, the General Secretary, sent out several letters reporting on the situation and discussingn plans. On September 3, in a letter to all members, Weil wrote: "The committee earnestly endeavored to take into consideration the recommendations submitted by you and I sincerely believe that you will feel as this Assembly has felt—that, while the plan is not perfect, it is a base on which to work and that you will back your leaders and our Association until it is perfected." (R. 287) Elsewhere in the same letter he says that "we are going through more or less uncharted seas." (R. 287) In a letter to all local chairmen about finances, he wrote on September 11, "Folks, we are having to feel our way and you must try to persuade your people to be patient." (R. 290) Can it really be supposed that the writer of these letters was regarded by the employees as one whose activities were designed to "translate" to them the desires of the management of the Company about their Association?

A membership canvass was now conducted; new applications were required to be made for membership in the reorganized Association. Signatures were secured upon membership cards and individual authorizations for the Company to deduct Associa-

tion dues from the pay of employees. There is no suggestion in the record that this was done on Company time or premises, nor indeed that the Company supported, directed, or interfered in any way with any of the proceedings we are relating. (R. 107, 178-179, 211)

The Assembly met for the first time under the new constitution on February 17, 1936 (Board's Exhibit 16), supported by a fresh mandate from the constituents in the form of 12,264 membership signatures. (Board's Exhibit 16, p. 12) The new constitution had been ratified, but the continuing and spontaneous interest of the members in the reorganization problem is strikingly shown by the proposals submitted at this session for further amendments to the constitution. Thirty-one amendments were proposed, originating from divisions or locals in Georgia, Florida, Louisiana, the Carolinas, Kentucky, Alabama, Tennessee, from the General Executive Board (three), and from individual representatives. Twelve were adopted; nineteen were rejected or withdrawn.

The minutes of this and subsequent sessions of the Assembly and of the meetings of the General Executive Board and of important bargaining conferences with the Company management, appear at length in the printed series of annual proceedings of the Association (Board's Exhibits 16, 19, 27, 28, 29) These are books of some size; unfortunately, it is impracticable to include them in the printed record before

this Court, and impossible to convey in this brief the conviction they establish in the mind of the reader of the spontaneous and uncontrolled character of the organization, both in its internal workings (of which some hint can be found in what we have presented here) and in its negotiations with the management of the Company.

We have given here, without the administrative and business features of the reorganization, and necessarily devoid of the essential human color, a brief outline of the way this Association reorganized itself to become independent of Company support. This is what the Board has characterized as "minor revisions" "accomplished by Askew, Weil and Wilkes," on account of whose leadership, "coupled with substantial continuity of existence," the Board draws the conclusion of "continued domination by the employer." (R. 115).

The record cannot be distorted to support such a finding. A fair reading of the documents we have cited and of the testiony will show that the Association moved in the matter with complete independence, that it was organized and functioned on highly democratic lines, and that its officers acted as responsible and responsive only to their own members. Proposals for action originated mostly with the divisions or locals, decisions were made by the thirty-five members of the General Assembly, important matters were referred back to the locals for ratification, full records of what was done were sent out for the infor-

mation of the members. The Association was dominated by nobody, certainly not by Askew, who was not followed; nor by Weil, as he "felt his way" through his "more or less uncharted seas" (R. 287, 290); nor by Mrs. Wilkes, with her Treasurer's reports and her "folksy" letters urging the "ladies and guys" to get new members and to authorize deductions of dues. (See Board's Exhibits 37 and 38) This record tells a different story from the one the Board has built up; it is a story of people who, however they may have differed in their methods from a certain type of union leaders, were stoutly and freely establishing their own organization according to their own wishes, and devoting it to the advancement of their own interests, fearlessly and controlled by nobody.

(d) Board's Error in Finding "Other Interference, Coercion and Restraint."

Under a caption containing these terms, the Board deals with the Shreveport incidents which occurred in the latter part of 1940. As heretofore pointed out, these consisted of an unauthorized remark by the local traffic manager, which was promptly repudiated by the General Traffic Manager, and a single ambiguous sentence by an employment supervisor, which is interpreted as hostile to the complaining union.

Mason, the local traffic manager at Shreveport, asked Mrs. Sibley, one of the supervisors,* to use her

*A supervisor in a telephone exchange is, in effect, an operator, and is not a supervisory officer. This has been heretofore recognized by the Board itself, in *The Matter of*

influence with the operators against the I. B. E. W. Mrs. Sibley testified to this, and testified that she spoke to two operators in response to this request. (R. 207-208) Mason's action was contrary to the Company's policy and to his own instructions. It was promptly repudiated and corrected. The General Traffic Manager thereafter reminded the Shreveport manager of the Company's fixed policy of neutrality in such matters, and instructed him to use great care to see that this policy was followed. (R. 243-244) Mason then called in all supervisor operators, including Mrs. Sibley, and instructed them that the Company wished to be absolutely neutral in the organizational contest. There is no dispute about this, and in fact Mrs. Sibley herself so testified on cross-examination. (R. 208-209)

The other occurrence is a conversation between Mrs. McCain, who was an employment supervisor at Shreveport, and one of the operators. An election was being held at the time by the local Association, and there was a contest for officers of the Association. (R. 204, 247) Mrs. McCain inquired of this operator as to which side she was on, and added, according to the operator, that it was a shame they could not fire the old dissatisfied employees. (R. 204) Mrs. McCain's testimony is that she was referring to the contest for officers in the Association and not

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Wisconsin Telephone Co., 12 NLRB 375, where the Board says: "They do not have supervisory powers over operators and do not possess disciplinary powers or the right to hire and discharge. They are not to be confused with employees designated as supervisory employees."

to the organizational contest between the Association and the I. B. E. W. (R. 247, 249, 250) She denied making the statement about dissatisfied employees, but the Board found that she did make the statement. (R. 247, 117)

This is all of the incident.

The Company operates over nine hundred telephone exchanges, and has about 20,000 employees eligible for membership in labor organizations. (R. 221) The Shreveport incidents involved four employees at that office. The incidents are so obviously trivial, so wholly unimportant in relation to the entire activities of the Company and its whole body of employees, so obviously contrary to the Company's policy, and so promptly corrected to the extent that they could have come to the notice of the management, that the significance attached to them by the Board reflects the complete lack of any real evidence of Company interference in this case.

The Board makes them the subject matter of a special finding as follows:

> "We find that the respondent, by the statements and acts of Mason, Sibley and McCain, described above, has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act." (R. 118)

In dealing with the action of the Traffic Manager in reprimanding the local manager at Shreveport

for what he had said to one supervisory operator, the Board remarks:

> "However, there was no showing that the traffic manager's reprimand of Mason was ever made known to the general body of employees at Shreveport." (R. 117)

There is no evidence that the general body of employees at Shreveport knew anything about Mason's conversation with Mrs. Sibley, or indeed that anybody ever heard of it except the two operators to whom the supervisor spoke. Indeed, however, within a very few months thereafter, the February, 1941, bulletin of the management was posted on all bulletin boards, which in the most sweeping terms again declared the Company's neutrality in labor matters.

We know of no way to show the utterly trivial character of these Shreveport incidents, viewed in the light of the wide organization of the Company, except by narrating the facts. The Board, however, has magnified them into an important subsidiary finding of interference and restraint supporting its final conclusion of disestablishment. The interpretation which the Board has placed upon the matter cannot be supported, we submit, as a reasonable inference from the evidence.

CONCLUSION

The foregoing argument has been directed to the part of the Board's order which requires the Company to withdraw recognition from the Association

and to cease to give effect to any contracts made with it. While the Board's order requires certain other things, none of them are of vital importance. The Company is ordered to cease and desist from dominating or interfering with the Association, from giving it financial or other support, and from interfering with or coercing its employees in the exercise of their rights to self-organization. Inasmuch as the Company did desist from these things as soon as the Act was passed, compliance with that part of the order is easy and is, indeed, being met. These provisions of the order, therefore, seem unwarranted and inappropriate, as does also that part of the order requiring the posting of notices of compliance.

As to that part of the order directing the disestablishment of the Association, we have sought to show that this action of the Board is based upon a finding of domination and interference on the part of the Company which is not supported by substantial evidence, but is contradicted by undisputed evidence. The record of this Company's compliance with the National Labor Relations Act shows that the Company is not interested in what form of organization its employees adopt. The Association has been freely chosen as the representative they desire, by more than 80% of the eligible employees. They were not coerced, intimidated, seduced, or influenced in any way to make that choice. If this provision of the order stands, the wishes of these people are to be overridden and their decision set at naught. The duty imposed by law on the Company to respect the wishes

of the employees by bargaining collectively with the agency they have chosen cannot be performed. Organized labor relations between this Company and its employees will come to a halt.

The Company's operations provide a public service which is essential at all times, and which is at the present time vital to the nation's war effort. The facilities of the Company and the efforts of the employees are now taxed to the utmost to provide the communication service so necessary to the prosecution of the war. The efficiency of the service depends to an unusual degree upon the morale of the great body of employees. An impartial reading of the record in this case shows with certainty, not only that the employees of this Company have the labor organization which they desire, but that they are fully satisfied therewith and with its efficient working. To destroy this organization, freely chosen by the employees themselves and through which they have negotiated with the management and have presented their demands and grievances, will inevitably lead to uneasiness, unrest, and dissatisfaction: It cannot promote industrial peace; it can only cause disturbance. This is a matter of deep concern, particularly at a time when this nation's war effort in the southeastern states is so largely dependent upon communication service. In the difficult conditions under which telephone people are performing their important duties today, they should be spared the problems and worries involved in doing again the job of organizing for collective bargaining. This is merely a realistic

application of the declaration in the first section of the National Labor Relations Act, that the denial to employees of the right to select their own organization for collective bargaining will lead to "industrial strife or unrest * * * burdening or obstructing commerce by impairing the efficiency, safety, or operation of the instrumentalities of commerce."

The action of the Circuit Court of Appeals in denying enforcement of the whole order was correct and should be affirmed.

Respectfully submitted,

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Atlanta, Georgia
February, 1943

APPENDIX

Pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Title 29, Sec. 151, *et seq.*) are set out below:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

• • •

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. • • •

• • •

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * *

(f) * * * the findings of the Board as to the facts, if supported by evidence, shall * * * be conclusive.